MOTION FILED
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No. 83-1336

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARY JONES, *et al.*,

Petitioners,

v.

AMALGAMATED WARBASSE HOUSES, INC., *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE AMERICAN CIVIL LIBERTIES UNION

JACK GREENBERG
CHARLES STEPHEN RALSTON*
99 Hudson Street
16th Floor
New York, N.Y. 10013
(212) 219-1900

Attorneys for the NAACP Legal Defense and Educational Fund, Inc.

E. RICHARD LARSON
BURT NEUBORNE
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

Attorneys for the American Civil Liberties Union

* Counsel of Record

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Motion for Leave To File Brief Amici Curiae	1
Summary of Argument	1
ARGUMENT	
I. The Lower Court Decisions Will Encourage Litigation of The Attorneys' Fees Issue And Will Make It Difficult for Disadvantaged Persons to Obtain Counsel	3
A. The Lower Court Decisions Encourage Litigation	3
B. The Lower Court Decisions Will Discourage Acceptance of Civil Rights Cases ...	6
II. The District Court Abused Its Discretion by Setting Aside A Negotiated Fee Settlement in Favor of A Sum More Advantageous to Respondents ...	8
III. The Lower Courts Did Not Apply The Correct Standards	13
Conclusion	17

Table of Authorities

Cases	Page
Armstrong v. Bd. of School Districts of the City of Milwaukee, 616 F.2d 305 (7th Cir. 1980), reh. and reh. en banc denied	10
Blum v. Stenson, S.Ct. NO. 81-1374 ..	7
Bradford v. Blum, 507 F. Supp. 526 (S.D.N.Y. 1981)	12
Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575 (5th Cir. 1980)	10
Custom v. Quern, 482 F. Supp. 1000 (N.D. Ill. 1980)	14
Doe v. Busbee, 684 F.2d 1375 (11th Cir. 1982)	15
Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980)	15
Gary B v. Cronin, 542 F. Supp. 102 (N.D. Ill. 1960)	14
Graves v. Barnes, 700 F.2d 220 (5th Cir. 1983)	10
Greenside v. Ariyoshi, 526 F. Supp. 1194 (D.C. HI, 1981)	15
Hensley v. Eckerhart, ___ U.S. ___, 76 L.Ed. 2d 40 (1983)	3,5,9

Page

Johnson v. Georgia Highway Express, Co., 488 F.2d 714 (5th Cir. 1974) 10

Marable v. Walker, 704 F.2d 1219 (11th Cir. 1983) 10

National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319 (D.C. Cir. 1982) 3

Northcross v. Board of Education of the School of Memphis, 611 F.2d 624 (6th Cir. 1979) 10

Piambino v. Bailey, 610 F.2d 1306 (5th Cir. 1980) 8

Selzer v. Fleisher, 629 F.2d 809 (2nd Cir. 1980) 12

Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982) 9

Thornberry v. Delta Airlines, Inc., 676 F.2d 1240 (9th Cir. 1982) .. 9

Statutes, Regulations and Rules:

F.R. Civ. P. 23(e) 8,9

42 U.S.C. § 1988 9

Page

Other Authorities:

H. Rep. No. 94-1558 (94th Cong. 2d Sess. (1976)) 7

National Law Journal, Feb. 27, 1984 11

7A C. Wright & A. Miller, Federal Practice & Procedure § 1797 (1972) 9

S. Rep. No. 94-1011 (94th Cong. 2d Sess. (1976)) 7,12,15

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

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The NAACP Legal Defense and Educational Fund, Inc. ("LDF") and the American Civil Liberties Union ("ACLU"), respectfully move the Court for leave to file the attached brief amici curiae in support of the petition for writ of certiorari in the above case. Although counsel for the petitioner and the respondent New York

State Division of Housing and Community Renewal have given their consent, respondent Amalgamated Warbasse Houses, Inc., has refused, thus necessitating this motion.

Amici are two non-profit, civil rights organizations which provide legal representation to persons seeking to vindicate civil and constitutional rights. Amici litigate throughout the federal courts and frequently appear as counsel before this Court representing Blacks, Hispanics and other minorities in cases arising under our federal civil rights laws and Constitution. Amici provide this representation through their own staff attorneys and through cooperating private counsel, whose substantial litigation costs and expenses are often paid by amici.

Attorneys' fees awarded to prevailing plaintiffs pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42

U.S.C. § 1988, directly affect both the quality and availability of representation for those parties traditionally served by amici. Since attorneys' fees are often the subject of arms' length negotiation between the parties, the standard of review to which a settlement is subjected by a trial court is of great concern to amici. If a trial court is able to substitute its judgment for that of the parties, where there is no evidence of collusion, adverse impact on the class, or windfall to plaintiff's counsel, and where the negotiated fee is reasonable, then it will become substantially more difficult for amici to provide much needed representation for clients otherwise unable to secure counsel.

Because we believe that the lower court decisions in this case will encourage parties to litigate the issue of attorneys' fees and make it more difficult for

poor persons to obtain counsel, we believe the views expressed in the attached Brief Amici Curiae will be of assistance to the Court in deciding whether to grant the petition.

Respectfully submitted,

JACK GREENBERG
CHARLES STEPHEN RALSTON*
99 Hudson Street
16th Floor
New York, N.Y. 10013
(212) 219-1900

Attorneys for Amicus Curiae
NAACP Legal Defense and
Educational Fund, Inc.

E. RICHARD LARSON
BURT NEUBORNE
132 West 43rd Street
New York, N.Y. 10036
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BRIEF FOR THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. AND THE AMERICAN CIVIL LIBERTIES UNION AS AMICI CURIAE

Summary of Argument

I.

The result reached by the courts below will necessarily result in a prolifieration of extended litigation over the amount of attorneys' fees. By discouraging settlement of fees questions and by introducing

uncertainty in the process, lawyers will be discouraged from taking civil rights cases, contrary to Congressional purpose.

II.

When a fee settlement is non-collusive, does not adversely affect class members, and provides for hourly rates in the range prevailing in the community, a district court should not substitute its judgment for that of the parties as to the reasonableness of the amount.

III.

The decisions below, by approving lower rates for civil rights cases, applied incorrect legal standards. They are contrary to Congressional intent and undermine the national policy of vigorous enforcement of the civil rights laws.

ARGUMENT

I.

The Lower Court Decisions WIll Encourage Litigation of Attorneys' Fees Issues And Will Make It Difficult for Disadvantaged Persons to Obtain Counsel.

A. The Lower Court Decisions Encourage Litigation.

In Hensley v. Eckerhart, ___ U.S. ___, 76 L.Ed. 2d 40 (1983) this Court stated that "[a] request for attorney's fees under 42 U.S.C. § 1988 should not result in a second major litigation," and that "ideally . . . litigants will settle the amount of a fee." Id. at 53. This view has also been advanced by lower courts. See, e.g., National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1330 (D.C. Cir. 1982). But the lower court decisions in the case at bar would actually encourage plaintiffs to litigate the amount of attorneys' fees.

The parties in this case conducted arms' length negotiations after they had reached agreement on all substantive matters and arrived at what they believed to be a fair and reasonable fee award. The district court then reduced this fee to what it considered to be a more reasonable sum, while acknowledging that there was no evidence of collusion, adverse impact on the class, or a windfall to plaintiffs' counsel.

If a district court may substitute its judgment for that of the parties in this manner, all incentives for plaintiffs to settle in these cases would be removed. A settlement would merely become a maximum figure under which a district court would then be free to fix the actual award. In the vast majority of cases, of course, the settlement figure is already a compromise amount that is less than what would be

sought by plaintiffs if the issue were litigated. It has been amici's experience that plaintiffs' counsel are willing to accept lower hourly rates, reduced hours, and/or the abandonment of any upward adjustment for contingency, etc., in exchange for speed and certainty of payment. The result of the lower court's decision is to remove these incentives to settlement.

It would, therefore, make more economic sense for plaintiffs to litigate the fee issue in most if not all cases. By seeking the full amount to which they believed themselves entitled, plaintiffs would almost certainly increase the maximum figure used by the district court by a detailed presentation using time records and extensive documentation. Such a result is not in accord with this Court's statements in Hensley, and is not sound policy.

B. The Lower Court Decisions Will Discourage Acceptance of Civil Rights Cases.

The district court in this case disregarded the negotiated fee and reduced the award to a sum it felt was more reasonable. Its actions, if upheld, will certainly discourage many private practitioners from accepting civil rights cases. Potential counsel would realize that, even assuming they could obtain a satisfactory result for their clients, any settlement of a fee amount no matter how reasonable could easily result in an inadequate award from the district court. Moreover, if they should decide to forego the settlement process entirely and litigate the issue, they would have to commit substantially more time and resources to the trial and subsequent appeals and they would still not be sure of a satisfactory result. Accepting a civil rights case would therefore

become a highly speculative venture for anyone without substantial independent resources.

As was argued by respondent and amici in Blum v. Stenson, No. 81-1374, the express purpose of Congress in enacting the 1976 Act was to encourage the private enforcement of civil rights cases. See, e.g., S. Rep. No. 1011, 94th Cong., 2d Sess. (1976) reprinted in 1976 U.S. Code Cong. & Ad. News 5908-14; H.R. Rep. No. 1558, 94th Cong. 2d Sess. (1976), reprinted in E. Larson, Federal Court Awards of Attorney's Fees, 288-312 (1981). This legislative purpose is seriously undermined by the decisions of the lower courts in this case. If considered in light of this Court's pronouncement that settlement of attorneys' fees should be encouraged, the legislative policy is best advanced by a rule which would require a district court

to assume the reasonableness of a negotiated fee settlement where there is no evidence of collusion, adverse impact or windfall to plaintiffs' counsel. Because neither the district nor the circuit courts adopted this analysis, this Court should grant Appellant's Petition of Certiorari and reverse the lower court decisions.

II.

The District Court Abused Its Discretion by Setting Aside A Negotiated Fee Settlement in Favor of A Sum More Advantageous to Respondents.

Under Federal Rule of Civil Procedure 23(e) all settlements of class actions require the approval of the district court. The courts and commentators generally agree that the purpose of this rule "is to protect the nonparty members of the class from unjust or unfair settlements affecting their rights." Piambino v. Bailey, 610 F.2d 1306, 1327 (5th Cir.

1980). See also 7A C. Wright & A. Miller, Federal Practice & Procedure § 1797, at 226 (1972). In addition, 42 U.S.C. § 1988 authorizes the court to award "reasonable" attorney fees. By implication then, F.R.C.P. 23(e) and the 1976 Act require the court to make some inquiry as to the reasonableness of a proposed settlement of attorneys' fees. But in the present case the district court abused its discretion by setting aside just such a reasonable fee.

A trial court undeniably has discretion to determine the amount of attorneys' fees to be awarded in a particular case.[1/] But this discretion is not unlimited. A district court may not, for example, arbi-

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1/ Hensley v. Eckerhart, supra at 53; Thornberry v. Delta Airlines, Inc., 676 F.2d 1240 (9th Cir. 1982); Spain v. Mountanos, 690 F.2d 742 (9th Cir. 1982).

trarily reduce hours or rates without explanation.[2/] And it has been held that a district court may not merely recite the factors of Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th cir. 1974) and announce a result.[3/] Most importantly, it has been held that despite its obligation to protect nonparty class members and the integrity of Rule 23(e) in all settlements, district courts should not "substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel," in any class action. Armstrong v. Bd. of School

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2/ Northcross v. Board of Education, 611 F.2d 624, 637 (6th Cir. 1979); Marable v. Walker, 704 F.2d 1219, 1222 (11th Cir. 1983).

3/ See, e.g., Northcross v. Board of Education, supra at 642; Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575, 583 (5th Cir. 1980); Graves v. Barnes, 700 F.2d 220, 221 (5th Cir. 1983).

Directors of the City of Milwaukee, 616 F.2d 305, 315 (7th Cir. 1980), reh. and reh. en banc denied, id. But this is exactly what the district court did in the case at bar.

The $129 per hour figure agreed to by the parties was neither excessive nor abnormal.[4/] The district court noted that

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4/ A recent report demonstrates that the negotiated fee was well within the range of hourly rates billed by New York firms. According to the National Law Journal, Feb. 27, 1984, p. 31, hourly rates billed by partners in major New York firms ranged from a low of $142 per hour to a high of $260 per hour, with an average rate of $183. The respective rates for associates were $71, $135, and $98 average. The same study shows that the average hourly rate in 1982 for lawyers with 11-20 years of experience in cities with more than one million in population in the Northeastern United States was $123. Id. at 32. Finally, the average hourly rate for partners specializing in antitrust cases was $159, with a low of $118 and a high of $238. The average rates for associates in antitrust firms was $85, with a low of $75 and a high of $104. (Id. at 34). Therefore, the hourly rate awarded by the district

it had approved a substantially similar fee in a recent case. Petition of writ of certiorari, pp. 40a-41a.[5] And equivalent fees have been granted in other settlements of civil rights cases. See, e.g., Bradford v. Blum, 507 F. Supp. 526 (S.D.N.Y. 1981). Moreover, as the Second Circuit noted, a federal magistrate assisted in these negotiations and the State Attorney General joined in the negotiations and agreement in this case. The settlement negotiations took place after all substantive issues had

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4/ continued

court was below the average market rates for associates generally, and at the lowest rate for associates specialing in antitrust cases, which Congress cited as the standard for measuring the reasonableness of fees in civil rights cases. S. Rep. No. 94 1011, p. 6, 94th Cong., 2d Sess. 1976.

5/ It should be noted that this latter fee was approved in a case where there was no agreement between the parties. See Selzer v. Fleisher, 629 F.2d 809, 814 (2d Cir. 1980).

been agreed to by the parties, so the eventual fee and even its reduction by the district court had no impact on the class. Under these circumstances, the settlement reached by the parties was clearly reasonable and equitable. The district court abused its discretion by setting aside this negotiated fee where there was no evidence of collusion, adverse impact to the class or windfall to plaintiffs' counsel. The court merely substituted its judgment for that of the parties while doing little to protect the integrity of Rule 23(e) or the legislative policy of the 1976 Act.

III.

The Lower Courts Did Not Apply The Correct Standards.

The district court began its analysis of the negotiated fee in this case by noting that it felt "constrained to scrutinise the attorneys' request with more

care" since both defendants were "dealing with taxpayers funds." (Pet. for Certiorari, p. 38a). The court implied that had the defendants in this case not been public entities, the "reasonableness" of the negotiated fee would have been assumed. The Court essentially applied a stricter standard of review to public litigants than it would have to private litigants, a position which has been rejected routinely by lower courts. See, e.g., Custom v. Quern, 482 F. Supp. 1000 (N.D. Ill. 1980); Gary B v. Cronin, 542 F. Supp. 102 (N.D. Ill. 1980). Since the purpose of the 1976 Act, was to increase the number of attorneys willing to accept constitutional and civil rights cases, Congress could not have intended that public defendants be shielded from higher attorneys if those

fees could be justified.[6/] The district court therefore erred by forcing the parties in this case to meet a higher standard of review.[7/]

6/ A number of the cases cited with approval in the Senate Report on 42 U.S.C. § 1988 involve public defendants. See, S. Rep. No. 94-1011 supra at 6 (1976).

7/ The District Court also justified its reduction of Appellant's fee because this case was settled and plaintiffs therefore "did not win." Pet. for Writ of Certiorari, p. 56a. It is well established that settlement does not weaken a prevailing plaintiffs' claims to attorneys' fees. Gagne v. Maher, 594 F.2d 336 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980); Greenside v. Ariyoshi, 526 F. Supp. 1194, 1196 (D.C. HI, 1981). See also Doe v. Busbee, 684 F.2d 1375 (11th Cir. 1982). As the Second Circuit noted, the settlement in the present case "provided significant relief to the class . . . ." Pet. for writ of certiorari, pp. 4a-5a. Under these circumstances, appellants should not be penalized for achieving a substantial result even though it came through the settlement process and not a full trial.

Finally, the court of appeals clearly based its decision on the notion that fee awards in civil rights cases should be "moderate" (Pet. for Writ of Cert., p. 12a); i.e., less than those routinely given in other types of litigation. Such a result, however, is squarely inconsistent with Congressional intent, which was to ensure that attorneys would be drawn to civil rights litigation by the availability of fees equivalent to those awarded in litigation such as anti-trust.

As we have demonstrated above (see n. 4, supra) the hourly rates awarded here are far below those available to similarly experienced attorneys in anti-trust and other specialties. The sure result will be to discourage the bar from taking on this type of complex litigation, and the subsequent undermining of the enforcement of the civil rights laws.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted and the judgment of the court below reversed.

Respectfully submitted,

JACK GREENBERG
CHARLES STEPHEN RALSTON*
99 Hudson Street
16th Floor
New York, N.Y. 10013
(212) 219-1900

Attorneys for Amicus Curiae
NAACP Legal Defense and
Educational Fund, Inc.

E. RICHARD LARSON
BURT NEUBORNE
132 West 43rd Street
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